"Execution can only issue under section 12 of the Arbitration Act 1889 by leave of the court. It is well known that leave is only given in clear cases. In other cases it is left to the successful party to the award to bring an action upon it and obtain the judgment in the usual course."

and at page 958 of the report Scrutton L.J. reaffirming the principle he had enunciated in *Re Bok's* case said:—

"Now the court only makes such an order when it is a clear case; if not clear, it leaves the parties to their ordinary legal rights."

The test propounded by Scrutton L.J. in 1919 *In re Boks'* case that

"this summary method of enforcing awards is only to be used in reasonably clear cases,"

was again followed and applied in 1959 in *Union Nationale des Co-operatives Agricoles de Cereales* v. *Robert Catterall & Co. Ltd.*[3] where Lord Evershed M.R. quoted with approval the above principle and said

"I will, therefore, assume that if we are to uphold the view taken by Hinchcliffe J. we must be of opinion that this is a reasonably clear case."

In the instant case I am of the opinion that the validity of the award is so doubtful and the case is far from clear that leave to enforce the award summarily should be refused, and that the successful party to the award should be left to its remedy to enforce it by action.

This application under section 13 of the Arbitration Ordinance 1950 for summary enforcement of the award is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Lim Cheng Poh & Co.; Skrine & Co.*

H.C. & ANOR. v. COMPTROLLER OF INCOME TAX

[O.C.J. (Winslow J.) August 7, 1970]

[Singapore — Income Tax Board of Review Appeal No. 11 of 1969]

Income Tax — Trading stock — Valuation of trading stock on discontinuance or transfer of trade or business — Valuation where there is no sale or transfer for valuable consideration — Income Tax Ordinance (Cap. 166), s. 32.

The company, S. Park Ltd., was incorporated in 1961 and in pursuance of its main objects it purchased over 52 acres of land in Dunearn Road and developed it as a building estate. On August 15, 1963 the T. and C. Properties Ltd. acquired the whole of the issued capital of the company. The company went into voluntary liquidation in December 1963 and the appellants were appointed liquidators. On August 29, 1964 the land belonging to the company was conveyed by the liquidators as vendors to T. and C. Properties Ltd. as purchasers in satisfaction of all the purchasers' share and interest amounting to the sum of $1,757,900. Before the liquidation the company had incurred certain development expenditure and finance charges. The Comptroller of Income Tax assessed the land as trading stock in the sum of $2,291,991 as representing its market value at that date. It was argued on behalf of the appellants that the transaction relating to the land was a mere transfer back by the company (a wholly owned subsidiary of T. and C. Properties Ltd.) to T. and C. Properties Ltd. (the parent company) and that the company in law and in fact made no profit on the land. The act of the liquidators was one of capital realization and not a commercial transaction. Alternatively it was argued that the alleged trading stock should have been valued under section 32(1)(a) of the Income Tax Ordinance in the sum of $1,757,900 and not under paragraph (b) of the section. It was also argued that the development expenditure and the finance charges relating to the land should in any event have been taken into account in the computation of the assessment to tax.

Held, dismissing the appeal: (1) the trading stock of the company was rightly valued under section 32(1)(b) of the Income Tax Ordinance as the land was not sold or transferred for valuable consideration;

(2) as the amount of the expenditure and finance charges had been left out of account in valuing the land in this case, the appellants were not entitled to a deduction for such amount.

Cases referred to:-

(1) *Bradshaw* v. *Blunden, (H.M. Inspector of Taxes) (No. 2)* 39 T.C. 73.

(2) *Wilson Box (Foreign Rights) Ltd.* v. *Brice* [1936] 3 All E.R. 728.

(3) *Baker* v. *Cook* [1937] 3 All E.R. 509.

(4) *Tebrau (Johore) Rubber Syndicate Ltd.* v. *Farmer* 5 T.C. 658.

(5) *Orchard Parks Ltd.* v. *Pogson* 42 T.C. 442.

(6) *Commissioner of Inland Revenue* v. *Nelson* 22 T.C. 716.

(7) *Osborne* v. *Steel Barrel Co. Ltd.* [1942] 1 All E.R. 634.

(8) *Doughty v. Commissioner of Taxes* [1927] A.C. 327.

(9) *Commissioner of Income Tax, Bombay City* v. *Sir Homi Mehta's Executors* 28 I.T.C. 928.

(10) *Californian Copper Syndicate (Ltd. & Reduced)* v. *Harris* 5 T.C. 159.

(11) *Sharkey* v. *Wernher* [1956] A.C. 58.

(12) *Sir Kikabhai Premchand* v. *C.I.T.* [1954] S.C.R. 219.

(13) *Watson Brothers* v. *Hornby* [1942] 2 All E.R. 506.

(14) *Bradshaw* v. *Blunden (H.M. Inspector of Taxes (No. 1)* 36 T.C. 397 at p. 405.

APPEAL FROM INCOME TAX BOARD OF REVIEW.

Michael Kerr Q.C. (*M. Karthigesu* with him) for the appellants.

Michael Nolan Q.C. (*Sat Pal Khattar* with him) for the respondent.

Cur. Adv. Vult.

Winslow J.: The sole though not so simple question that arises for determination on this appeal is whether the appellants who are joint liquidators of S. Park Ltd., to which I shall refer as the company, were correctly charged and assessed to tax by the Comptroller of Income Tax in the sum of $522,116.40, as subsequently confirmed by the Board of Review, by virtue of the provisions of section 32 1(b) of the Income Tax Ordinance (Cap. 166) read in conjunction with section 35(5)(a) thereof on the notional income of its principal asset consisting of development land at S. Park in Dunearn Road as on 28th December, 1963 which is the date of the discontinuance

of the trade or business carried on by the company when it went into voluntary liquidation.

Counsel for the appellants submitted that there is no reported decision on the application of section 32 in Singapore since it became part of our law in 1948 or on the application of its equivalent in England or elsewhere. In this I do not think that he is entirely correct, *vide Bradshaw* v. *Blunden (H.M. Inspector of Taxes) (No. 2)*[1], with which I shall deal more fully later in this judgment.

The facts found by the board are not in dispute save in one respect as will appear later. Briefly, the undisputed facts are as follows: —

(a) The company was incorporated in November, 1961 and, not long afterwards, in pursuit of one of its main objects, purchased over 52 acres of land in Dunearn Road and proceeded to develop it with a view to erecting two-storey bungalows on it for sale to the public;

(b) By 15th August, 1963 at least 70 houses were in various stages of construction on this land;

(c) On this date T. and C. Properties Ltd. (hereinafter referred to as T. and C.), which was incorporated on 24th July, 1963 as a private limited company, acquired the whole of the issued share capital of the company comprising 16,000 ordinary shares of $100 each in return for which T. and C. issued to the shareholders of the company *pro rata* 2,900,000 ordinary shares of $1 each in T. and C. On 26th August, 1963 T. and C. went public;

(d) Although development by the company of the land ceased between 15th August, 1963 and early December, 1963, it re-commenced thereafter and continued until 28th December, 1963 when the company went into voluntary liquidation as a result of a special resolution passed on that date appointing the present appellants its liquidators. The company accordingly was engaged in its trade or business until that date when the business was discontinued as the board found. A sum of $738,240 was incurred as development expenditure by the company as also was a sum of $58,080 as finance charges;

(e) On 29th August, 1964 the land in question was conveyed by the liquidators as "vendors" to T. and C. as "purchaser" in satisfaction of all the purchaser's share and interest amounting to the sum of $1,757,900";

(f) A few days before the company went into liquidation, T. and C. purchased two further lots of 800 ordinary shares each in the company at a premium of $181.25 per share, the total cost being $290,000;

(g) On the date of discontinuance T. and C. held 17,579 shares at $100 each in the company out of a total of 17,600 such shares which had been issued up to that date. The remaining 21 shares were held by nominees of T. and C.;

(h) There was no dispute before me as there was before the board that the land in question was trading stock within the meaning of section 32 of the Income Tax Ordinance and I am including this under the head of undisputed facts although strictly speaking it is also a question of law.

I should mention now, however, a question of fact which is in dispute *i.e.* whether the valuation by the comptroller of this land as trading stock in the sum of $2,291,991 on the date of discontinuance as representing its market value on that date did or did not take into account the development expenditure and finance charges to which I have already referred amounting to a total of $796,320. I shall be dealing with this later as it was the third alternative issue in the contentions of the appellants that, if the property was properly chargeable and assessable to tax under section 32, allowance should have been made for this expenditure in the computation of tax.

Counsel for the appellants submitted that there were 3 issues for determination by me on this appeal as follows: —

I — as set out in paragraph 1(c) & (d) and paragraph 3(viii) of the petition of appeal, *viz.*,

"(c) That the company in law and in fact had made no profit on the land, Lot 230 Mukim XV;

(d) That the transaction was a mere transfer back by the company (a wholly owned subsidiary of T. and C.) to T. and C. (the parent company of the company) and was thus not a commercial transaction;

3(viii) That the board erred in law in failing to differentiate between capital realisation and commercial transactions. The act of the liquidators was one of capital realisation. The board should have followed the cases relied on by the petitioners/appellants namely *Wilson Box (Foreign Rights) Ltd.* v. *Brice*[2]; *Baker* v. *Cook*[3] and *Tebrau (Johore) Rubber Syndicate Ltd.* v. *Farmer*[4]. The board should not have followed *Orchard Parks Ltd.* v. *Pogson*[5]."

Alternatively,

II — as set out in paragraph 3(ix), *viz.*,

"3(ix) That the alleged trading stock, *i.e.* the land and premises in question should have been valued under section 32(1)(a) of the Income Tax Ordinance, 1966, in the sum of $1,757,900.00 and not under paragraph (b) of this section."

III — as set out in paragraph 3(x) *viz.*

"3(x) That the development expenditure of $738,240.00 and the finance charges of $58,080.00 relating to the land and premises should in any event have been taken into account in the computation of the assessment to tax."

With regard to the first issue, the appellants' contentions, briefly, were that the company made no actual gain or profit on the transfer of the land in 1964 which was only an act of capital realisation, that there was no chargeable income as such, and that section 32 had no application being only a valuation section and not a charging section.

It may be useful at this stage for me to set out the provisions of section 32(1): —

Valuation of trading stock on discontinuance or transfer of trade or business.

32(1). In computing for any purpose of this Ordinance the gains or profits of a trade or business which has been discontinued or transferred, any trading stock belonging to the trade or business at the discontinuance or transfer thereof shall be valued as follows:—

(a) in the case of any such trading stock

(i) which is sold or transferred for valuable consideration to a person who carries on or intends to carry on a trade or business in Singapore; and

(ii) the cost whereof may be deducted by the purchaser as an expense in computing for any such purpose the gains or profits of that trade or business,

the value thereof shall be taken to be the amount realised on the sale or the value of the consideration given for the transfer;

(b) in the case of any other such trading stock, the value thereof shall be taken to be the amount which it would have realised if it had been sold in the open market at the discontinuance or transfer of the trade or business."

With regard to the second issue, counsel for the appellants submitted that, if the first issue failed, then, alternatively, the second issue would arise for consideration *viz.*, that the trading stock in question had been

transferred for valuable consideration to T. and C. who were carrying on a similar trade or business in Singapore and that the value thereof should be computed in accordance with the provisions of section 32(1)(a) of the Ordinance *i.e.* the actual value of the consideration given for the transfer which, according to the appellants, amounted to $1,757,900 being the consideration stated in the conveyance of 29th August, 1964 by the liquidators as vendors to T. and C. as purchaser.

The comptroller of course had made his valuation of the trading stock in question under the provisions of section 32(1)(b) and he considered that the property fell to be valued at its market value on the date of discontinuance *i.e.* 28th December, 1963. The board upheld this view on the ground that paragraph (b) clearly states that the value of any trading stock not falling within paragraph (a) shall be taken to be the amount which it would have realised if it had been sold in the open market at the discontinuance of the trade or business. It is not disputed that no actual gain or profit was made on that date because no sale or transfer for valuable consideration took place then. It was contended for the comptroller therefore that gains or profits of the trade or business which had been discontinued had to be computed on its notional gains or profits had the property been sold in the open market on that date.

I have since writing the foregoing part of this judgment received written submissions from both counsel on the appeal summarising their previous contentions which I asked them to submit as a precaution against any possible error in my notes of argument as to what they had actually said in their oral submissions. I expected these written submissions to be made in a much more concise form. Counsel have, however, chosen to set them out almost as fully as they were argued in open court and for this I am grateful. I shall refer to these written submissions as "AWS" (for the appellants) and "RWS" (for the respondent) respectively in the course of this judgment.

I never had much doubt at the conclusion of the hearing last April what my final decision on this appeal would be. Out of deference, however, to the fact that eminent counsel had been specially imported at some expense from England whence most of our laws stem to argue this appeal largely on a question of law of some importance (if only for its novelty) to say nothing of the magnitude of the sum involved in this controversy, I reserved judgment and even invited the written submissions to which I have referred in order to ensure that I was right in my original tentative views.

It would have been comparatively easy for me to have given a decision almost immediately after the hearing but the eloquence of Mr. Michael Kerr, counsel for the appellants, restrained me because he had undoubtedly devoted much time and lucubration towards attempting to expose the fallacies in the comptroller's contentions which he tried to do forcibly and at length. Mr. Michael Nolan, on the other hand, on behalf of the comptroller took the matter in his stride, if I may say so with respect, and seemed to consider that the answer was a foregone conclusion by his less demonstrative, though none the less remonstrative and confident approach to the problem.

At his approach to the appeal one cannot really express any profound surprise because the language of section 32 of the Income Tax Ordinance, in my view, appears to be crystal clear, "lifted" as it is, almost wholly from section 26 of the Finance Act of the United Kingdom of 1938 (re-enacted as section 143 of the Income Tax Act, 1952).

This section was enacted at a time when cases like *Commissioner of Inland Revenue* v. *Nelson*[6] enabled a trading tax payer who sold the assets of his former business after discontinuing his trade to avoid income tax in respect of any gains or profits made. As a note to *Halsbury's* Statutes in relation to section 26 of the Finance Act 1938 states (at page 400 of its 2nd Ed. of Vol. 12):

> "If, after a trader discontinued his trade, he sold the assets of his former business, the sale not being a realisation of assets in the course of trade, he would not be liable to income tax in respect of the profits; see e.g. *Inland Revenue Commrs.* v. *Nelson*. This section avoids the loss of tax involved by this principle by requiring him to bring in as the value of the stock on discontinuance the amount realised on the sale of the assets (or the value to be put upon the consideration received in respect thereof)."

One can therefore better appreciate Mr. Michael Kerr's contentions with regard to paragraph (b) of section 26(1) of the English Act and its near-equivalent in our section 32(1)(b) of our Ordinance. The general note to section 26 from which I have just quoted tends to support the view that section 26 and our section 32 contemplate the case of an actual sale of assets on discontinuance. The amount realised on sale or the value to be put on the consideration received in respect of such a sale would then determine the quantum of tax. In the *Nelson* case, to which I have referred there was in fact an actual sale after discontinuance which, however, was not a sale in the course of trade, and was therefore not subject to tax. Section 26 would clearly have caught *Nelson* if enacted in time. The question however remains whether this note is exhaustive of the whole of the section including paragraph (b). There can be little doubt that *Nelson* would have fallen within paragraph (a).

The written submissions at "AWS" now make it abundantly clear that counsel for the appellants strives for the proposition that any computation of tax under section 32 could only have been properly made, if at all, if there had been an actual sale or transfer for valuable consideration of the company's land. Mr. Kerr has accordingly added, without objection, new grounds, namely, the two issues which he has described as the second and third alternative issues or points.

Mr. Kerr's contention is that paragraph (b) can only apply to an actual sale or receipt of valuable consideration for transfer of the trade or business on discontinuance. *Osborne* v. *Steel Barrel Co. Ltd.*[7] is also another case like *Nelson* where there was such a sale and the court had to consider what valuation should be attached to the consideration received for such sale

which was partly in cash and partly in fully paid-up shares in the purchaser company concerned. That case, is, however, of little assistance here because that again is a case which determines, in my view, how the value of the consideration received under paragraph (a) should be determined. In the *Osborne* case certain fully paid-up shares which formed part of the consideration were, it was contended, of no value, whereas the court in that case held that they had to bear their *par* value on face. The *Nelson* case and the *Osborne* case are therefore of little assistance in the interpretation of paragraph (b).

Before proceeding to deal with the second alternative issue relating to computation of tax under paragraph (b) therefore it would perhaps be useful now to revert to Mr. Kerr's first point or issue to the effect that section 32 is not a charging section, that it is only a valuation section, and having regard to the general scheme of the whole Ordinance, no tax was leviable under section 32 in the circumstances of this particular case.

Mr. Kerr took me through various sections of the Ordinance which contain words like "shall be deemed to be the income" and argued that words such as these should have been used in section 32 as they were in other parts of the Ordinance to ensure a clear chargeability to tax on income. He complained that unless such clear words were used in section 32 there was nothing which could be regarded as income since gains and profits within the contemplation of section 32 were not deemed to be income for any purpose of the Ordinance.

The short answer to Mr. Kerr's submissions on this point is that, as Mr. Nolan said, there is no magic in the words "shall be deemed to be income". Words such as "may be treated as" or "shall be taken to be" also mean the same thing. When one looks at section 10 one realises that the gains or profits of any trade or business are regarded as income chargeable to tax. Section 32 sets out how the valuation of trading stock should be determined in the circumstances set out therein for any purpose of this Ordinance and that clearly, to my mind, means for the purpose of section 10. I can think of no reason why it does not.

Mr. Kerr, however, said that this is the crucial and ultimately the only question on the first point and he has set out in paragraph (3) of his reasons with regard to this point or issue the matters which must be borne in mind which he elaborates in some detail in subsequent paragraphs. In paragraph (5) of "AWS" he really gets to the crux of the matter by stating that there only remains the question under paragraph (3)(iv) as to the construction of section 32.

His contentions may be summarised as follows:

(a) Words which have been used in other parts of the Ordinance again and again are not used in section 32. In other words, section 32 does not say that the value of the stock for the purposes of section 32 shall be deemed to be income. Whereas, for example, section 10(4) expressly provides for a balancing charge, in the circumstances set out therein, to be deemed to be income, section 32 is silent. I have already dealt with this.

(b) Section 32 merely provides a method of valuation and this method of valuation can only apply if actual income has been derived from trading stock on discontinuance or transfer of the trade or business.

In paragraphs (6), (7) and (8) of his reasons for his first point Mr. Kerr reiterates somewhat strongly that section 32 only contemplates an actual gain or profit. In effect, he says that, where there has been an actual sale or valuable consideration given, paragraph (a) of sub-section (1) applies but paragraph (b) of sub-section (1) can only apply where there has been an actual sale or where valuable consideration has been given in cases of other such trading stock which does not qualify under paragraph (a), as for example, in the case of sales to persons who do not carry on or intend to carry on trade or business in Singapore and the cost whereof may not be deducted by the purchaser as an expense in computing the gains or profits of that trade or business as sub-paragraphs (i) and (ii) of paragraph (a) require.

To crystallize his argument further, what Mr. Kerr contends for is that the method of valuation described in paragraph (b) only arises when there has been an actual sale or transfer for valuable consideration to someone who is not in the same trade or business and who has no intention of carrying on such trade or business in Singapore, such as a foreigner or someone who, without intending to trade in Singapore, purchases such stock as an investment. It is only in such cases, it is contended, that paragraph (b) applies and the actual sale value or the value of the consideration given can be impeached by the comptroller by attributing to such other trading stock its actual market value as on the date of such sale or transfer and not the value placed on it by the parties.

Mr. Kerr concludes paragraph (8) of his reasons on his first point as follows:

"But it does not mean that as a result of a mere book transfer, as in the course of the reorganisation of the assets of a business or company, the transferee is deemed to be in receipt of an income equal to the value of the stock when in fact there is no gain or profit to him at all".

Another important point taken on appeal was to the effect that no actual gain or profit accrued to the appellants and that therefore this was not a gain or profit earned in the course of trade but was merely the realisation of a capital asset which had improved in value and not a commercial transaction yielding any actual gain or profit to the company.

The first point is obviously the crucial point in the whole appeal and Mr. Kerr relied on it far more than on the second or third points with which I shall deal in due course. Incidentally, he was confident that he should succeed on the third point with regard to the development expenditure and the finance charges incurred by the company in any event.

I think that I can dispose of the second alternative point here and now before dealing with the first crucial point as to whether tax was leviable at all under section 32 read with section 35(5)(a) in the light of section 10. So far as the second alternative issue or point is concerned I am against him.

There was no sale or transfer for valuable consideration by the liquidators to T. and C. and in my judgment paragraph (a) has no application whatsoever. There was considerable reference before the Board of Review and also some reference before me to the effect that the actual valuable consideration received under paragraph (a) was as claimed in the second issue. As the Chairman of the Board of Review has said, one must, however, always bear in mind that there is a clear distinction between members who are shareholders of a limited company and the company itself. The shareholders of the company on 15th August 1963 sold their shares in effect at a premium to T. and C. For shares to the value of $1,600,000, they received *pro rata* the equivalent of shares of the par value of $2,900,000 thereby literally making T. and C. the sole shareholder in the company owning all its shares. A further 1,600 shares in the company were purchased by T. and C. at a premium just before the voluntary liquidation of the company in December 1963 but 21 of these shares were placed in the names of the nominees. It should be remembered that the company was making no actual profit then.

The purported transfer *in specie* of the surplus assets of the company in 1964 by the liquidators was to T. and C., the consideration being stated to be the *par* value of 17,579 shares of $100 each. The other 21 nominees were not considered at all. Mr. Nolan has said that not one cent passed from T. and C. to the company or to its liquidators. No money actually passed at all during the original takeover of the shares of the original shareholders in the company by T. and C. As I have already said, the original shareholders of the company received shares in T. and C. to the face value of almost double what they had previously held in the company. The original shareholders of the company did not become the only shareholders of T. and C., there being others. In *Doughty* v. *Commissioner of Taxes*[8] the two partners reorganised their business in such a way that when they formed a limited company to which they transferred their business, they were also the only two shareholders in that limited company. Such is not the case here. This therefore was not the reorganisation of a business or a mere book-transfer but essentially a commercial transaction in disguise.

Let me approach the problem from a different angle. Supposing the company had sold its principal asset, the land in question, to T. and C. direct before 15th August 1963, instead of allowing T. and C. to take over all the shares in accordance with the arrangement already described by giving to the original shareholders of the company shares worth almost double their original *par* value in T. and C., what would the position have been?

In those circumstances, of course, section 32 would have had no application because there would have been no question of the discontinuance of their business or liquidation or anything of that kind, and whatever profit had been made on a sale by the company to T. and C. of such asset would, in the ordinary way, have been subject to tax under section 10 as a sale in the ordinary course of trade, and there could never have been any question that such a sale was the realisation of a capital asset. An interesting question would have arisen, if this had happened, as to the amount for which the company would have sold the property.

I have little doubt that they would have sold it for about the amount set out in the valuation made by the licensed appraisers in July 1963 as shown in the prospectus issued by T. and C. *i.e.* to the tune of nearly 2.9 million dollars. For tax purposes, expenditure incurred by the company would have been deducted and tax would have been assessed on the equivalent of 2.2 million dollars as did in fact ultimately happen in this case though not in the ordinary way but by invoking the provisions of section 32(1)(b).

If one looks at the matter in this way it becomes quite clear that there never was any sale or transfer for valuable consideration by the company to T. and C. How therefore can it be successfully contended that there has been an actual sale or transfer for valuable consideration on the discontinuance of the company's trade or business merely because the shareholders of the company (and not the company itself) chose a different way of setting about their method of so-called "reorganisation" so as, in effect, to enable transfer of this asset *in specie* to T. and C. Even the commissioner for stamps took the view that there was no actual sale or transfer for valuable consideration. Otherwise he would have charged *ad valorem* duty and not as what he in fact did. I entirely agree with the submissions of Mr. Nolan on this particular point supported as he is by the cases he has cited, which I need not repeat.

This brings me to the question whether the method adopted in this case was a legitimate way of avoiding tax, to put it very bluntly. I have been told that my decision may have far reaching consequences not only in relation to this particular appeal but also other connected matters which have been similarly handled. At the same time I was also informed that the liquidators may find themselves in some difficulty because of their not having made provision for tax as required by section 59 when they conveyed the property in question to T. and C.

I will now look at the matter from another point of view. Supposing the company had decided before August, 1963 to wind itself up and the liquidators had sold the property in question in the course of trade it is very unlikely that this would have been regarded as a non-taxable sale having regard to the *Tebrau* case[4] where the facts were different. In that case it was held that the property when sold was not sold in accordance with its objects which did not include the trade of purchasing and selling land but contemplated development of the land in question as a rubber estate which for some reason they were unable to pursue. The facts here are completely different. The case of *Orchard Parks Ltd.* v. *Pogson*[5] is accordingly nearer this one than the *Tebrau* case or any other case cited on the point. No two cases of course are identical on all the facts but I think the Board of Review was entitled to find some similarity between the *Orchard Parks* case and this one and to proceed accordingly.

That I think disposes of the second and the third issues. I can think of no reason why the Board of Review could not have reached the conclusion which it did. There was ample material on which it could have confirmed as it did the assessment of the comptroller with which I entirely agree. On the second and the third issues therefore I would entirely adopt the written submissions of the respondent at "RWS".

In his written submissions he has admirably summarised the position with regard to the third issue. He said that relief is already given for the $796,319 by leaving it out of account in valuing the land. In thus dealing with the matter the comptroller followed the procedure approved by the eminent auditors of S. Park and of T. and C. of treating the benefit of the development and finance expenditure as a separate asset from the land.

The same procedure is followed in the T. and C. purchase ledger where it will be seen that the development and finance expenditure are treated as having been transferred at cost from S. Park to T. and C. and the land is separately shown as having been acquired for $2,291,991, the figure adopted by the comptroller as the value of the land. The comptroller saw no good reason for departing from the taxpayers' accounts and he followed the accounting procedure of treating the land as a separate asset from the development and finance expenditure. The appellants never suggested to the board that they should have a deduction for this amount in addition to having the land valued at $2,291,991 rather than $3,088,310. I agree that the board would have rejected such a suggestion if the appellants had made it and I also agree that this is an unmeritorious attempt to obtain relief twice for the same expenditure.

It only remains for me to deal with the first issue and to make some observations on what I consider to be the authorities which help in the interpretation of section 32(1)(b) of our Ordinance.

It should be remembered that the *Doughty* case and *Commissioner of Income-Tax, Bombay City* v. *Sir Homi Mehta's Executors*[9] were decided when in New Zealand and in India there never were provisions similar to section 26 of the English Act or section 32 of our Ordinance. I have already indicated earlier that if the property had been sold or exchanged for shares in T. and C. the difference between the purchase price of the land in question and the proceeds of sale or the value of the shares for which the property was exchanged would be profit assessable to income tax. That was what happened even without any reliance on section 32 or its equivalent in the Scottish case of *Californian Copper Syndicate (Limited & Reduced)* v. *Harris*[10]. Are the present appellants to be treated differently merely because a different method of achieving the same ultimate object was adopted, if not on behalf of the company itself, at least on behalf of its original shareholders who received shares of an enhanced value in T. and C.?

Before turning to the *Bradshaw* case I think it would be useful to mention the case of *Sharkey* v. *Wernher*[11], which is a House of Lords decision. That, it will be remembered, is a case where Lady Zia Wernher transferred some horses from her taxable stud farm to her recreational non-taxable racing stables. Viscount Simonds said at page 68:

"The problem, therefore, in all its simplicity, is whether a person, carrying on the trade of farming or, I suppose, any other trade, who disposes of part of his stock in trade not by way of sale in the course of trade but for his own use, enjoyment, or recreation, must bring into his trading account for income tax purposes the market value of that stock in trade at the time of such disposition."

It will be observed that the decision of the House of Lords is in direct opposition to the decision of the Indian Supreme Court in cases like *Mehta's Executors*[9] and *Kikabhai Premchand* v. *C.I.T.*[12]. Although the judgments of the House of Lords in *Wernher's* case do not specifically mention section 26 of the English Act it is clear from the language and reasoning of Lord Radcliffe at least that his Lordship must have borne this provision in mind. Lord Radcliffe said:

"In a situation where everything is to some extent fictitious, I think that we should prefer the third alternative of entering as a receipt a figure equivalent to the current realizable value of the stock item transferred. In other words, I think that the case of *Watson Brothers* v. *Hornby*[13] was rightly decided and that its principle is applicable to all those cases in which the income tax system requires that part of a taxpayer's activities should be isolated and treated as a self-contained trade. The realizable value figure is neither more nor less "real" than the cost figure, and in my opinion it is to be preferred for two reasons. First, it gives a fairer measure of assessable trading profits as between one taxpayer and another, for it eliminates variations which are due to no other cause than any one taxpayer's decision as to what proportion of his total product he will supply to himself. A formula which achieves this makes for a more equitable distribution of the burden of tax, and is to be preferred on that account. Secondly, it seems to me better economics to credit the trading owner with the current realizable value of any stock which he has chosen to dispose of without commercial disposal than to credit him with an amount equivalent to the accumulated expenses in respect of that stock. In that sense, the trader's choice is itself the receipt, in that he appropriates value to himself or his donee direct instead of adopting the alternative method of a commercial sale and subsequent appropriation of the proceeds."

Even Viscount Simonds in the same case stated that there was ample justification for saying that if any of the cases cited was correctly decided, the legislature had made inevitable some invasion of the principle that the taxpayer cannot make a profit by selling to himself.

So much for *Sharkey* v. *Wernher*. I now turn to the *Bradshaw* case. There, some houses were retained by the trading taxpayer after discontinuance of his business as part of his private stock. There were at least 76 houses which remained unsold from the total which he originally possessed some of which had been sold from time to time. Regardless of the fact that after discontinuance some houses still continued to be sold from his private stock and regardless of the fact that some 76 houses still remained unsold the court held that all the houses retained from the original trading stock were subject to tax and were caught by section 26(1)(b).

Mr. Kerr argued strenuously to the effect that this case was no authority for holding that a fictitious gain or profit was taxable in the circumstances of cases like *Bradshaw* or for that matter the present case be-

fore me. In any event he said the matter was never fully argued and he therefore urged upon me that I should not consider myself bound by the decision in the *Bradshaw* case.

I have given very careful thought to all the cases cited on either side having relation to section 26 or to cases like *Doughty, Mehta, Kikabhai, Wilson Box* and so on. *Bradshaw* is the only case of course directly bearing on section 26(1)(b). There is no known Singapore or Malaysian case on this point. The decision in the *Bradshaw* case is of course not a decision of the English Court of Appeal or the House of Lords but it is a decision of Pennycuick J. which has never been challenged or taken on appeal to any higher court. Whilst I am aware that sometimes a decision which is not taken further may not necessarily be correct I have come to the conclusion after careful perusal of the whole of the reported case including the case stated by the special commissioners and the judgment of Pennycuick J. himself and after also having perused the whole of the case as reported when it first went before Roxburgh J. in *Bradshaw* v. *Blunden (H.M. Inspector of Taxes) (No. 1)*[14] that it was correctly decided and I consider that although I am not bound by it I would not be far wrong in following it.

In conclusion, I would refer to another of Mr. Kerr's contentions that, since section 32(2) clearly contemplates an actual sale to a purchaser whose gains or profits shall be computed as provided therein, therefore no notional sale can be envisaged by section 32(1)(b). I cannot understand the logic of this submission. In my view, sub-section (2) only provides a method of computing the gains or profits of a purchaser where such trading stock on discontinuance has actually been sold to him.

Supposing the purchaser is a person who does not carry on or intend to carry on a trade or business in Singapore or purchases merely for investment purposes the actual sale price may be less than its market value under sub-section (1)(b). If so, the purchaser's gains or profits will be computed in relation to the market value. If the trading stock in question, however, is not sold on discontinuance but retained without an actual sale as an investment or otherwise there will be no purchaser whose gains or profits will require computation for any purposes of the Ordinance under that sub-section and that sub-section cannot accordingly limit the construction of subsection (1)(b) which, as I have already said, is crystal clear.

For all these reasons, the appeal fails and is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill.*

PERUMAL v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) August 14, 1970]

[Kuala Lumpur — Federal Court Criminal Reference No. X. 3 of 1969]

Bribery and Corruption — Sanction — Whether sanction required for prescribed offence under the Act — Institution of prosecution — Point of time for institution of prosecution — Plea to charge — Whether consent of Public Prosecutor given subsequently sufficient — Prevention of Corruption Act, 1961, s. 26.

The High Court reserved for the decision of the Federal Court the following questions of law:—

"1. (a) Where an accused is charged for an offence under the Prevention of Corruption Act 1961 in addition or alternatively to a prescribed offence, is a consent required by section 26 of the said Act sufficient if it authorizes the prosecution of the accused only for an offence under the Act?

(b) If the answer is in the negative, what is the effect on a trial proceeding with such consent only?

2. Is the point of time for institution of a prosecution within the meaning of section 26 of the Act the moment at which the court asks an accused person to plead to the charge and, if not, what is the point of time indicated?

3. If no adequate consent is available and no Deputy Public Prosecutor is present at the time when an accused person is required to plead to an offence under the Prevention of Corruption Act and/or a prescribed offence, would the presence of the Deputy Public Prosecutor as prosecutor at the hearing of the said charges against the accused on a subsequent date be deemed to be sufficient consent for institution of prosecution within the meaning of section 26?"

The appellant was charged in the Sessions Court, Kuala Lumpur under the Prevention of Corruption Act, 1961 and alternatively under section 165 of the Penal Code. A written consent of the Deputy Public Prosecutor was produced, but this related only to the charge under the Prevention of Corruption Act, 1961.

Held: (1) where an accused is charged for an offence under the Prevention of Corruption Act, 1961 in addition or alternatively to a prescribed offence, the consent required by section 26 of the Act is sufficient if it authorizes the prosecution of the accused only for an offence under the Act. The consent of the Public Prosecutor or his Deputy is not required when the accused is charged with a prescribed offence;

(2) a prosecution under the Act is instituted when the accused is called upon to plead to the charge. If no consent is available and no Deputy Public Prosecutor is present at the time the accused person is called upon to plead to an offence under the Act, the consent of the Deputy Public Prosecutor given subsequently does not constitute a sufficient consent for the prosecution within the meaning of section 26 of the Act.

Cases referred to:-

(1) *Abdul Hamid* v. *Public Prosecutor* [1956] M.L.J. 231.

(2) *Ng Yan Pee* v. *Public Prosecutor* (1959) 3 M.C. 249.

(3) *John Brooks and William Gibson* 175 E.R. 166.

(4) *Thorpe* v. *Priestnall* [1897] 1 Q.B. 159.

(5) *Beardshley* v. *Giddings* [1904] 1 K.B. 847.

(6) *Brooks* v. *Bagshaw* [1904] 2 K.B. 798.

(7) *Haji Mohamed Paiman* v. *Public Prosecutor* [1966] 1 M.L.J. 58.

(8) *Public Prosecutor* v. *Oei Hee Koi* [1968] 1 M.L.J. 148.

(9) *Lyn Hong Yap* v. *Public Prosecutor* [1956] M.L.J. 226.